



# DEPARTMENT OF THE AIR FORCE

ARLINGTON, VA

Office of the Deputy General Counsel

30 AUG 2004

## MEMORANDUM IN SUPPORT OF THE DEBARMENTS OF:

MARK ZWISCHENBERGER, a/k/a  
MARK SCHWISCHENBERGER, a/k/a  
MARK SWISCHENBERGER  
LSC DISTRIBUTING, a/k/a  
L.S.C. DISTRIBUTING, a/k/a  
LEWIS IMPLEMENT CO., INC.  
MDZ, INC., a/k/a  
M.D.Z., INC., d/b/a  
LEWIS SEED COMPANY, a/k/a  
LEWIS SEED CO LANDSCAPING DIVISION, a/k/a  
LOUIS SEED CO.  
JLZ LEASE ACCOUNT, INC.

Effective April 14, 2004, the Air Force proposed the debarments of Mark Zwischenberger, a/k/a Mark Schwischenberger, a/k/a Mark Swischenberger (M. Zwischenberger), LSC Distributing, a/k/a L.S.C. Distributing, a/k/a Lewis Implement Company, Inc. (LSC), MDZ, Inc., a/k/a M.D.Z., Inc., d/b/a Lewis Seed Company, a/k/a Lewis Seed CO Landscaping Division, a/k/a Louis Seed Co. (MDZ), and JLZ Lease Account, Inc. (JLZ) (collectively, "Respondents"), from Government contracting or subcontracting and from directly or indirectly receiving the benefits of federal assistance programs. The proposed debarments were initiated pursuant to Federal Acquisition Regulation (FAR) Subpart 9.4.

By letter dated July 1, 2004, Respondents, through counsel, submitted information and arguments in opposition to the proposed debarments (the submission). I have read and carefully considered the submission and all the information in the administrative record (the record).

### INFORMATION IN THE RECORD

Information in the record indicates that at all times relevant hereto:

1. AM-AR International, Ltd. (AM-AR International) was a Government contractor engaged in the supply and repair of military aircraft parts to foreign countries, the Department of Defense (DoD), and the Air Force. Specifically, AM-AR International performed under U.S. Government Foreign Military Sales Program (FMS) contracts<sup>1</sup> held by Science Applications International

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<sup>1</sup> The FMS was a DoD program designed to assist friendly foreign nations in acquiring needed military items from U.S. suppliers. Pursuant to the FMS, the U.S. Air Force selected prime contractors in the United States to purchase military items on behalf of foreign governments, and are paid a fee for this service. In return, the DoD provides safeguards to the foreign nations against fraud and abuse by American contractors.

Corporation, and Lear-Siegler Management Services, Inc. (Lear-Siegler). Gary Douglas Burks (Burks) owned and operated AM-AR International.

2. Lear-Siegler was an Air Force FMS contractor acting as the buyer of aircraft parts ordered by the Royal Saudi Air Force (RSAF). Lear-Siegler was required to operate under the same acquisition rules as a Government agency. These rules prohibited AM-AR International from being the sole source parts supplier to Lear-Siegler, unless it provided cost or pricing data for the parts and disclosed its costs and profit margins.

3. Burks, as the mastermind and ringleader of a conspiracy to defraud the Government and the RSAF by circumventing Government procurement regulations (the conspiracy), used AM-AR International to create or facilitate the creation of several shell companies and sham distributors through which AM-AR International provided bogus parts bids. LSC<sup>2</sup> was one of the sham distributors engaged in the conspiracy. The shell companies and sham distributors bid on parts orders to project the illusion of competition. The conspiracy enabled AM-AR International to fraudulently inflate prices charged to Lear-Siegler by \$1.2 million.

4. M. Zwischenberger owned and controlled LSC. M. Zwischenberger was an owner, the president, and the chief executive officer of MDZ, a wholesale seed company that shared facilities with LSC.

5. Joseph L. Zwischenberger owned and operated JLZ, a wholesaler of farm implements, and was the father of M. Zwischenberger. JLZ and LSC shared facilities. In accordance with information provided by Caroline Clark, attorney for the Respondents, J. Zwischenberger is now deceased.

### DISCUSSION

Respondents offer several arguments in opposition to their proposed debarments. First, they argue that although M. Zwischenberger owns LSC, his actual position is one of oversight, as he is not actively involved in its day-to-day operations. For the purpose of this proceeding, I will accept as true that M. Zwischenberger is not actively involved in the day-to-day operations of LSC.<sup>3</sup> However, Respondents do not dispute LSC's conduct in the conspiracy or the affiliation of M. Zwischenberger and LSC. As the owner of LSC, M. Zwischenberger controls the company. They are, accordingly, affiliates.

According to the submission, LSC, rather than MDZ, was directly involved in the conspiracy and MDZ was merely affiliated with LSC. Respondents argue that LSC and MDZ are now entirely separate entities. Even as separate entities, LSC and MDZ are still controlled by M. Zwischenberger as evidenced by the common ownership. Pursuant to FAR 9.403, interlocking management or ownership is an indicator of control so as to make M. Zwischenberger, LSC, and MDZ affiliates of each other.

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<sup>2</sup> LSC was a Kentucky distributor purporting to be a wholesale seed and farm supply company.

<sup>3</sup> The submission does not specifically address M. Zwischenberger's involvement in LSC at the time of the misconduct that gave rise to the current administrative action.

M. Zwischenberger's and LSC's misconduct in the conspiracy is not disputed, and is of so serious or compelling a nature to warrant their debarments pursuant to FAR 9.406-2(c).

Respondents argue that M. Zwischenberger cooperated with Government officials during its investigation of Am-Ar International and that he was a material witness for the United States during its prosecution of Gary Burks, et al. They further argue that M. Zwischenberger's cooperation is demonstrative of his acceptance of responsibility for his role in the conspiracy, which should mitigate his debarment. M. Zwischenberger's cooperation came after the investigation started. He did not come forward until he had been caught. These mitigating factors have been considered and support a debarment term of less than the three years generally imposed.

### FINDINGS

1. LSC's and M. Zwischenberger's improper conduct is of so serious and compelling a nature that it affects their present responsibility to be Government contractors or subcontractors and provides a separate basis for their debarments pursuant to FAR 9.406-2(c).
2. Pursuant to FAR 9.406-1(b), debarments may be extended to the affiliates of a contractor.
  - a. M. Zwischenberger, LSC, and MDZ are affiliates as defined in FAR 9.403 (affiliates), because directly or indirectly M. Zwischenberger controls or can control LSC and MDZ. That affiliation provides a separate basis for the debarments of M. Zwischenberger, LSC, and MDZ.
  - b. Pursuant to FAR 9.403, interlocking management or ownership, shared facilities and equipment, and common use of employees are "indicia of control" so as to make entities affiliates of each other. LSC, MDZ, and JLZ are affiliates of each other as evidenced by the interlocking management or ownership, use of shared/common facilities, equipment, and employees. That affiliation provides a separate and independent basis for the debarments of MDZ and JLZ.
3. Pursuant to FAR 9.406-5(b), the seriously improper conduct of LSC may be imputed to M. Zwischenberger, because as an officer, director, shareholder, partner, employee, or other individual associated with LSC, he participated in, knew of, or had reason to know of LSC's seriously improper conduct. The imputation of LSC's seriously improper conduct provides a separate basis for the debarment of M. Zwischenberger.
4. Pursuant to FAR 9.406-5(a), the seriously improper conduct of M. Zwischenberger may be imputed to LSC because his seriously improper conduct occurred in connection with his performance of duties for or on behalf of LSC, or with LSC's knowledge, approval, or acquiescence. The imputation of M. Zwischenberger's seriously improper conduct to LSC provides a separate basis for its debarment.

## DECISION

Pursuant to the authority granted by FAR Subpart 9.4, Defense FAR Supplement, subpart 209.4, and 32 C.F.R. Section 25, and based on the preponderance of the evidence contained in the administrative record and the findings herein, Mark Zwischenberger, a/k/a Mark Schwischenberger, a/k/a Mark Swischenberger, LSC Distributing, a/k/a L.S.C. Distributing, a/k/a Lewis Implement Company, Inc., MDZ, Inc., a/k/a M.D.Z., Inc., d/b/a Lewis Seed Company, a/k/a Lewis Seed CO Landscaping Division, a/k/a Louis Seed Co., and JLZ Lease Account, Inc., are debarred for a period of two years from April 14, 2004, the date they were proposed for debarment. Their debarments shall terminate on April 13, 2006. The proposed debarment of J. Zwischenberger is terminated.



STEVEN A. SHAW  
Deputy General Counsel  
(Contractor Responsibility)